

August 26, 1999

D.T.E. 98-22

Investigation by the Department of Telecommunications and Energy upon its own motion, pursuant to G.L. chapters 164, 165 and 166A commencing a review of standards employed by public utility operators when restoring municipal street surfaces after performing excavations.

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ATTACHMENT: Standards to Be Employed by Public Utility Operators When Restoring
any of the Streets, Lanes and Highways in Municipalities

I. PROCEDURAL HISTORY

On February 13, 1998, the Department of Telecommunications and Energy ("Department"), pursuant to G.L. chapters 164, 165 and 166A, issued to all utility companies under its jurisdiction a Notice of Compliance Review. The notice requested that each utility provide the Department, by March 13, 1998, with a copy of its standards¹ or procedures for excavation and resurfacing openings in public ways, as well as a copy of internal written statements or policies designed to insure that managers and crews are aware of, and held accountable to, standards and procedures for street excavation and repair. Thirty-two operators responded to the notice.²

On May 1, 1998, the Department invited each municipality to comment on the companies' responses and on the performance of individual public utility operators under the Department's jurisdiction. The Department received 125 responses from municipalities. A number of municipalities expressed concern with the utilities' failure to adequately restore roads by (1) irregular pavement cutting; (2) poor placement and compaction of backfill material; (3) poor preparation of the excavation and adjacent pavement to receive the patch material; (4) poor placement and compaction of patch material; (5) failure to seal joints; (6) ineffective field control; and (7) slow response when called back to correct repair failures.

¹ A standard is "[a] type, model, or combination of elements accepted as correct or perfect." Blacks Law Dictionary 1404 (6th ed. 1990).

² The respondents included: gas local distribution companies; electric companies; cable television companies; telephone companies; private water companies; municipal gas/electric departments; interstate gas pipeline companies; and the Massachusetts Bay Transportation Authority.

Other municipalities expressed a need for consistency in the guidelines for repair and maintenance of trenches and utility cuts.

After considering the responses of the utilities and the municipalities to the Department's notices, the Department formed a technical committee ("Committee") to formulate reasonable operator standards and procedures for utilities to follow for street excavation and repair.³ The Department conducted technical conferences with the Committee on July 23 and August 12, 1998.

On November 20, 1998, the Committee filed with the Department a document entitled "Restoration of Municipal Streets" that proposed street restoration standards. The Committee's proposal was based upon the Commonwealth of Massachusetts Department of Public Works Standard Specifications for Highways and Bridges, 1988 Edition ("Massachusetts Highway Standards") and permit requirements.⁴ Any entity that excavates or works in a State road must follow applicable Massachusetts Highway Department ("MHD") standards and permit requirements.⁵ On November 24, 1998, the Department conducted a third technical conference to discuss the Committee's proposed standards.

³ The Department invited two representatives from the gas industry and one representative from each of the following groups to participate on the Committee: electric companies; water companies; cable companies; telephone companies; the New England Gas Association; Massachusetts Municipal Association; Massachusetts Highway Department; and the Southeastern Regional Services Group. In addition, the Department invited one municipal representative from each of the seven Massachusetts Highway Association districts to participate on the Committee.

⁴ The Department, pursuant to 220 C.M.R. § 1.10(3), hereby incorporates the Massachusetts Highway Standards into the record of this proceeding.

⁵ MHD was formerly known as the Massachusetts Department of Public Works.

Based upon the Committee's proposed standards, the Department developed its own document, "Standards to Be Employed by Public Utility Operators When Restoring any of the Streets, Lanes and Highways in Municipalities" ("Standards"). On May 11, 1999, after notice duly issued, the Department conducted a public hearing and accepted written comments on the Standards until May 18, 1999.⁶

Comments on the Standards were submitted by New England Telephone and Telegraph Company, d/b/a Bell Atlantic ("Bell Atlantic"); Berkshire Gas Company ("Berkshire"); the City of Boston ("Boston"); Boston Edison Company ("BECo"); Boston Gas Company ("Boston Gas"); Bowker Consulting ("Bowker"); the City of Brockton ("Brockton"); the City of Cambridge ("Cambridge"); Colonial Gas Company ("Colonial"); Commonwealth Gas Company ("ComGas"); Senator James Jajuga (Third Essex District); Massachusetts Concrete & Aggregate Producers Association, Inc. ("MCAPA"); Massachusetts Electric Company and Nantucket Electric Company ("MECo/Nantucket"); Massachusetts Highway Association ("MHA"); Massachusetts Municipal Association ("MMA"); the City of Medford ("Medford"); New England Gas Association ("NEGA"); RCN-BECo Com LLC ("RCN-BECo Com"); the City of Somerville ("Somerville"); the Southeastern Regional Services Group ("SERSG")⁷; Representative Joseph C. Sullivan (5th Norfolk District); and the Town of Wellesley ("Wellesley").

II. DEPARTMENT AUTHORITY TO CONDUCT THIS INVESTIGATION

⁶ The Department granted the City of Boston and Massachusetts Municipal Association extensions to file comments on May 28 and June 3, 1999 respectively.

⁷ SERSG represents 17 municipalities in southeastern Massachusetts.

Pursuant to G.L. c. 25, § 4, and G.L. c. 164, § 76, the Department, on its own motion, commenced this investigation into the quality of service of utilities to their customers and the general public, as it relates to the restoration of public ways following utility excavations. The Department is responding to complaints by municipalities that utilities were not meeting their responsibility to properly restore street surfaces in the public way after excavations. We are also responding to the Supreme Judicial Court (“SJC”) decisions that invalidated municipal ordinances related to utility street-opening permits because those ordinances were inconsistent with and pre-empted by G.L. c. 164. Boston Gas Company v. City of Newton, 425 Mass. 697 (1997) (“Newton”) Boston Gas Company v. City of Somerville, 420 Mass. 702 (1995) (“Somerville”).⁸

The Department has “general supervision of all gas and electric companies and shall make all necessary examination and inquiries and keep itself informed as to ... the manner in which [gas and electric companies] are conducted with reference to the safety and convenience of the public, and as to their compliance with the provisions of law and the orders, directions and requirements of the Department.” G.L. c. 164, § 76; see also, G.L. c. 165, § 4

⁸ In Newton, the SJC struck down a city ordinance that required utilities to pay maintenance and inspection fees as a prerequisite to opening a public way on the grounds that the ordinance was inconsistent with and pre-empted by G.L. c. 164. Newton, 425 Mass. 697, 700, 701 (1997). In Somerville, the SJC struck down as inconsistent with state law a municipal ordinance that required a utility to hire particular contractors, selected by the city, to provide patching, paving, and repair services at specified rates. In addition, the ordinance required the utility to pay certain fees, use certain materials and paving techniques to repair the streets, and mandated that the utility’s responsibility for the excavation continue for three years beyond the final infrared treatment. Somerville, 420 Mass. 702, 703, 705.

(Department general supervisory authority over water companies); G.L. c. 159, § 16 (Department authority to regulate and supervise activities of telephone utilities). The Department possesses "broad investigative authority over electric utilities and may properly inquire into ... the efficiency of [a regulated utility's] operations and the productivity of all its employees, both management and non-management." Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 43, 44 (1978). The Department has conducted several investigations into the quality of service of regulated utility companies. See Rules and Practices Relating to Telephone Service to Residential Customers of New England Telephone Company, D.P.U. 18448 (1977); Western Massachusetts Electric Company, D.P.U. 95-86 (1995) (review of WMECo emergency plans and procedures); Eastern Edison Company, D.P.U. 85-232 (1986) (Department orders Eastern Edison to revise its storm emergency plan); Investigation by the Department Regarding Hurricane Bob, D.P.U. 91-228 (1992) (investigation of emergency plans and restoration of service of all jurisdictional electric utility companies in Massachusetts).

III. DISCUSSION AND ANALYSIS

A. Purpose of the Standards

The Standards in this Order are intended to ensure that all utilities under the Department's jurisdiction adopt, as part of their operating procedures, a recognized, uniform standard and associated procedures for backfill, compaction and resurfacing public ways. The Standards are consistent with and conducive to the fundamental State policy of ensuring uniform and efficient utility services to the public. See Somerville, 420 Mass. 702, 706 (1995).

The SJC has found that G.L. c. 164, § 70 imposes an affirmative obligation on a utility to restore all streets, lanes, and highways to the condition they were in prior to being opened and to inspect excavation sites after the necessary repairs have been made.⁹ See Newton, 425 Mass. 697, 699-701 (1997); Somerville, 420 Mass. 702, 705 (1995); see also, G.L. c. 166A, § 5(g). Further, the SJC has held that G.L. c. 164, § 70 does not require a utility to maintain the street after the excavation site has been repaired. Newton, 425 Mass. 697, 700 (1997); Seltzer v. Amesbury & Salisbury Gas Co., 188 Mass. 242, 244 (1905).

The Department has reviewed the individual utility street restoration plans submitted in response to our February 13, 1998 Notice of Compliance Review. We find that those utility plans vary considerably in detail and substance. In light of this finding, and in response to the request by municipalities for a consistent standard based upon generally acceptable street restoration methods, we conclude that a single standard would be in the public interest.

The Department appreciates the time and thought of the Committee in proposing draft standards to the Department. With the understanding that the Committee's work represents an agreement among diverse interests in this proceeding, the Department, in formulating our Standards, retained as much of the Committee's proposal as was practicable. In reviewing the Committee's proposal, the Department considered the reasonableness of each element of the

⁹ G.L. c. 164, § 70 reads in pertinent part that:
[a] gas company may, with the written consent of the aldermen or the selectmen, dig up and open the ground in any of the streets, lanes and highways of a town It shall put all such streets, lanes and highways in as good repair as they were in when opened; and upon failure to do so within a reasonable time, shall be guilty of a nuisance. See also, G.L. c. 166A § 5(g) (cable companies to restore opened streets to "as good condition as before entry").

Committee's proposal and all the documentation submitted in the record of this proceeding.

The Department also reviewed each term of the Committee's proposal to determine whether the provisions are consistent with applicable law, Department precedent, and the public interest.

See Berkshire Gas Company, D.P.U. 96-92, at 8 (1996); Boston Gas Company, D.P.U. 96-50, at 7 (Phase I) (1996); Massachusetts Electric Company, D.P.U. 96-59, at 7 (1996).

The Department received a substantial number of comments and recommendations on the proposed Standards. We have considered all of these comments and the entire record in this proceeding and, where appropriate, revised the Standards. In the next section, we will discuss the modifications made to the Standards that the Department first proposed for public comment on April 16, 1999. The final Standards are attached to this Order.

B. Section-By-Section Analysis of Revisions to the Standards

1. Section One - Purpose and Scope

We added one sentence to § 1.2 of the proposed Standards that states "[n]othing in these Standards is intended to prevent a utility and a municipality from mutually agreeing to exceptions to these Standards." Section 1.2 of the Standards now reads:

Nothing in these standards may be construed to restrict the Constitutional or statutory authority of cities or towns ("Municipalities") with respect to public ways. Nothing in these standards is intended to prevent a Utility and a Municipality from mutually agreeing to exceptions to these standards.

Some commenters stated that the Standards needed specific language for those communities that maintain their own contracts for permanent pavers for the repair of utility excavations (MMA Comments at 1; Cambridge Comments at 1; Tr. at 17-18). The proposed Standards were silent on the status of a mutual agreement between a utility and municipality regarding, among other

things, the use of a city-retained contractor for excavation repairs. Such mutual agreements are an option available to utilities because they allow utilities and municipalities to (1) reconcile issues not specifically addressed or contemplated by the Standards and (2) forge cost-effective arrangements that may be mutually beneficial. The reasonableness and allowance of any such agreement would be a question in a ratemaking proceeding

We added the words “ordinance or” to § 1.3 to make it clear that this section includes all laws enacted by towns and cities and to be consistent with the language in G.L. c. 43B, § 13 (Exercise of Powers and Functions by Municipalities). Therefore, § 1.3 of the Standards now reads:

Nothing in these standards is intended to be inconsistent with any ordinance or by-law and the constitution and laws of the Commonwealth.

We note that the intent of § 1.3 is to ensure that these Standards do not “impinge on the right of cities and towns to regulate their streets” (see Boston Comments at 1). These Standards regulate only those utilities under our jurisdiction.¹⁰ As for a by-law or ordinance that may differ from these Standards, we note that one of the purposes of §§ 1.2 and 1.3 of the Standards is to recognize that the Standards cannot, as a matter of law, pre-empt any ordinance or by-law that is consistent with State laws.

¹⁰ We note that the definition of “Utility” in the Standards is based upon the language in G.L. c. 25, § 3.

[A]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or law enacted by the general court . . .

Art. 89, § 6 of the Amendments to the Massachusetts Constitution. See also, G.L. c. 43B,

§ 13. Whether a particular ordinance or by-law is consistent with any State law is a question for the courts to decide. See Newton, 425 Mass. 697, 699 (1997); Somerville, 420 Mass. 702, 704 (1995).

The Department added a new Section 1.4 to the Standards.

Nothing in these standards is intended to create a contractor relationship between a Municipality and the Utilities regulated by the DTE.

Commenters stated that this provision is necessary to make it clear that the municipality/utility relationship is not expanded beyond the grantor/grantee relationship that pertains to street opening permits (ComGas Comments at 7-8; MMA Comments at 9; Tr. at 30-31). This language is based upon language contained in the Massachusetts Highway Standards and was language in the original document proposed by the Committee. Upon consideration of the comments and the entire record in this proceeding, we have modified § 1.4 of the Standards as noted.¹¹

2. Section Two - Definitions

We added “Cold Patch” to the definitions which is defined as, “bituminous concrete made with slow curing asphalts and used primarily as a temporary patching material when hot mix plants are closed.” We added the definition to avoid ambiguity concerning the term (see

¹¹ Since we added § 1.4, the numbering for the other standards in the Purpose and Scope section has been adjusted accordingly.

Wellesley Comments at 1).

We have revised our definition of the term “Controlled Density Fill” (“CDF”) by adding the sentence, “[h]igh air (25% plus) may be used instead of fly ash with an adjustment in sand content.” This change was made in response to one commenter’s concern that CDF containing fly ash is corrosive to metallic pipe (Boston Gas Comments at 3). Another commenter noted that it is important to use CDF meeting MHD specifications and this revision of the definition meets MHD specifications (MHA Comments at 5). We agree and have revised the definition to reflect MHD specifications.

We revised the definition of “Infrared Process” to read “a recycling procedure whereby an infrared heater plasticizes the surface of an asphalt pavement, preparatory to the introduction of additional compatible paving materials uniformly re-worked and compacted to achieve a density and profile consistent and thoroughly integrated with the adjacent pavement.” We agree with the comments that this is a more accurate description of the process involved and revised the definition accordingly (MHA Comments at 1; MMA Comments at 5).

We revised the definition of “Massachusetts Highway Standards” to read “the Commonwealth of Massachusetts Department of Public Works Standard Specifications For Highways and Bridges, 1988 Edition.” The Committee had based its proposed standards upon the 1988 Edition (MHA Comments at 2; MMA Comments at 6; Boston Gas Comments at 2).

We revised the definition of “Newly Paved Road” to read “a road whose re-paving is less than five years old.” The proposed definition included only those roads reconstructed with both a binder and top course. However, we agree with commenters that a roadway overlaid

with 1.5 inches of Class I bituminous concrete was intended to be protected for a period of five years (MHA comments at 2; MMA comments at 6).

3. Section Three - Permit Requirements

We revised the first paragraph in § 3.0 to now read:

3.0 Permit Requirements

Each Municipality may incorporate in its permit procedures the portions of these standards that shall apply to Utility excavations within its jurisdiction. A permit may be issued with the stipulation that it may be modified or revoked with just cause at any time at the discretion of the Municipality without rendering the Municipality liable in any way. It is recognized that each Municipality shall have the authority to inspect work in progress and the Utility shall correct any deficiencies identified during said inspections. The following are the requirements that a Municipality may require of a Utility when granting Permits.

We deleted the word “minimum” from (1) the title of section 3.0 and (2) the final sentence of the paragraph following the title. We also added the following language to the second sentence to read, “[a] permit may be issued with the stipulation that it may be modified or revoked with just cause at any time at the discretion of the Municipality without rendering the Municipality liable in any way.”

Several Commenters objected to the word “minimum” as too restrictive to utilities and not expressly stated in the standards proposed by the Committee (Boston Gas Comments at 2-3; Tr. at 22-24). Other Commenters requested that we add language to allow municipalities to revoke permits for due cause (MHA Comments at 3; MMA Comments at 8). Upon consideration of these comments and review of the Standards, we agree with the

suggested edits and modified § 3.0.¹²

We added to § 3.3, “in accordance with G.L. c. 82, § 40.” Section 3.3 now reads:

The Utility shall notify Dig Safe, in accordance with G.L. c. 82, § 40, at least 72 hours prior to the start of work for the purpose of identifying the location of underground utilities.

One Commenter suggested including the term “Dig Safe” by adding a provision that a Utility provide notice in accordance with Dig Safe requirements (ComGas Comments at 3-4). See G.L. c. 82, § 40; 220 C.M.R. §§ 99.00 et seq. Our revised wording reminds utilities that they must comply with the statutory requirements of Dig Safe.

We added “(except for emergency repair work)” to § 3.5. Section 3.5 now reads:

A copy of the Permit must be on the job site at all times for inspection (except for emergency repair work). Failure to have the permit available could result in suspension of the rights granted by the Permit.

We added language excepting emergency repair work from this requirement since a permit may not be obtainable before commencing emergency work (see ComGas Comments at 4).

One commenter expressed concern about the liability and indemnification provision in § 3.9 (Bell Atlantic Comments at 1-2). The Commenter stated that the provision is overbroad and could potentially expose utilities to large and uncertain levels of liability, and may have an

¹² We again note that utilities and municipalities can mutually agree to any exceptions to these Standards, and these Standards can not pre-empt any ordinance or by-law that is otherwise consistent with State laws (Standards at § 1.02). Further, a utility that fails to comply with these Standards can have its permit revoked until such utility meets the Standards and any other legally applicable municipal requirements (Standards at § 3.0).

adverse impact on rates (id. at 2).¹³

We note that any person injured because of an excavation in a public street may be able to recover damages on the ground that the excavation constituted a nuisance, without any such express liability or indemnification language. See Bern v. Boston Consolidated Gas Company, 310 Mass 651 (1942); see also G.L. c. 164, § 70. In addition, a utility is liable for the negligent acts and omissions¹⁴ of its agents that are not directly connected to the utility services it provides. See Lebowitz Jewelers v New England Telephone and Telegraph Company, 24 Mass. App. Ct. 268, 278, n. 9 (1987), citing McNicholas v. New England Telephone and Telegraph Company, 196 Mass. 138 (1907) (telephone company liable where child injured when a telephone linesman installing a line negligently dropped a insulator cover); Hoxie v New England Telephone and Telegraph Company, 287 Mass. 121 (1934) (telephone company liable where bicyclist killed by negligent operation of telephone company's motor vehicle). Accordingly, in light of the decisions mentioned above, we conclude that § 3.9 is not

¹³ Several courts have held that there are sound public policy reasons for shielding utility companies from certain damage claims because such limitation allows a utility to set its rates at a reasonable level. See Lebowitz Jewelers v New England Telephone and Telegraph Company, 24 Mass. App. Ct. 268, 273 (1987) (regulation of telephone company precluded finding of liability against telephone company for negligent act which allowed burglars to neutralize signal to police, allowing theft). Limitation of liability is an inherent part of a tariffed rate. See Western Union Telephone Company v. Esteve Gros. & Co., 256 U.S. 566, 572 (1921).

¹⁴ We also note that some utilities have terms in their tariff exempting the company from liability from interruption in service unless caused by the utility's own "negligent acts or omissions." Western Massachusetts Electric Company, D.P.U. 95-86, at 55 (1995). Tariffed utility service is not a contract relationship, Boston Edison Company, 390 Mass. 772, 777 (1984), and claims sounding in tort (e.g., "negligent acts or omissions") lie within the jurisdiction of the courts, not the Department. D.P.U. 95-86, at 55 (1995).

necessary and deleted it.

4. Section Four - Work Standards

We revised Section 4.1 to read, “All work shall be in compliance with the Massachusetts Highway Standards as it pertains to utility street excavations and repairs unless modified by these standards.” This change was necessary to be consistent with the definition of Massachusetts Highway Standards.

5. Section Five - Safety

We revised a portion of Section 5.5 to correct a typographical error to now correctly read, “Manual on Uniform Traffic Control Devices (MUTCD).”

6. Section Six - Protection of Adjoining Facilities

We revised § 6.13 to read, “These standards do not cover the installation of any utility poles.” Commenters noted that utility pole installation does not require a permit (Bell Atlantic Comments at 2; BECo Comments at 4). In light of these comments, and upon consideration of the language proposed by the Committee, we revised this section accordingly.

7. Section Eight - Backfill and Compaction

The Department revised § 8.4 to read, “CDF shall be utilized for those excavations where compaction cannot be readily accomplished with normal compaction methods (i.e. vacuum holes, utility clusters).” Commenters stated that the wording in Section 8.4 deviated from the original language agreed to by the Committee (MECo/ Nantucket Comments at 2; ComGas Comments at 6-7). We agree that the original wording could lead to disagreement about how this standard would be applied and therefore added “vacuum holes, utility clusters.”

We revised the first sentence in § 8.7.2 to read, “Suitable backfill material is free of stones larger than half the size of the compacted lift as provided for in Massachusetts Highway Standards, construction debris, trash, frozen soil and other foreign material.” This revision is in response to comments requesting clarification that the largest stone in a lift not exceed half the size of the compacted lift (MHA Comments at 6-7; MMA Comments at 13).

We revised § 8.12.8 to read, “All maintenance work shall be compacted in 6" lifts.” In response to comments, we deleted the words “prior to compaction” because this wording was extraneous and did not add to the meaning of this section (MHA Comments at 7; MMA Comments at 14).

8. Section Nine - Pavement Restoration

We revised § 9.4 to read, “All non-emergency pavement excavations shall be repaired with same day permanent patches unless specifically exempted in the permit.” One commenter stated that same day paving was very much the exception (RCN-BECo-Com Comments at 5). However, the record indicates that the Committee’s consensus is that the installation of same day patching is the preferred method by both utilities and municipalities. Other commenters also requested to modify this Section to reflect the original wording submitted by the Committee to the Department (ComGas Comments at 7; MHA Comments at 7; MMA Comments at 14). Upon consideration of the comments and review of the record in this proceeding we have modified this section accordingly.¹⁵

¹⁵ In situations where permanent patches may not be possible, the utility and municipality can agree to exceptions (Standards at § 1.2).

We revised the last sentence of § 9.8 to read, “All pavement courses shall be thoroughly compacted prior to placement of subsequent courses” to correct a typographical error. Some commenters noted that the language referring to “Proctor” density in the Department’s proposed Standards does not pertain to compaction of pavement (Boston Gas Comments at 5; Bowker Comments at 2; MHA Comments at 7; MMA Comments at 15).

We have revised § 9.11 by deleting § 9.11.c, “[w]ork performed when it is not feasible to place a permanent patch.” Some commenters noted a conflict with § 9.4 (Boston Gas Comments at 5; ComGas Comments at 5; NEGA Comments at 2). Other commenters noted that the proposed wording in § 9.11.c was vague and might be subject to future disagreements between municipalities and utilities about the circumstances in which it would be infeasible to place a permanent patch (MHA Comments at 8; MMA Comments at 15). We agree and revised the language of § 9.11 accordingly by deletion.

We deleted § 9.14 which read, “Bituminous concrete shall not be installed between November 15th and April 15th except as allowed by the Municipality.” A number of commenters recommended that § 9.14 be deleted stating that bituminous concrete is generally available year round (Boston Gas Comments at 4; Comgas Comments at 5; BECo Comments at 6; NEGA Comments at 2 MHA Comments at 8; MMA Comments at 16). Some commenters noted a conflict between the timing provisions of § 9.14 and those of §§ 9.11b and 9.15 (ComGas Comments at 5; NEGA Comments at 2). Upon consideration of these

comments, we deleted § 9.14.¹⁶

We revised the second sentence of the proposed Standards at § 9.15, now renumbered § 9.14, to read, “Temporary patches made between December 1 and March 30 shall be removed and replaced with a permanent patch as outlined above within five (5) working days.” One commenter recommended a 60 day period in which to replace temporary patches made during the winter (BEC Co Comments at 6). Other commenters suggested using the original wording submitted by the Committee (MHA Comments at 8; MMA Comments at 16). Since bituminous concrete is available year round, this change encourages a permanent patch be made in a reasonable amount of time. A utility and municipality can agree to more specific terms as an exception, if circumstances warrant. Thus, we revised the language accordingly.

We revised proposed Standards at § 9.16, now renumbered § 9.15, by deleting the second sentence that concerns inspection of temporary patches until a permanent patch is made. The Standard at § 9.15 now reads, “[t]he Utility shall be responsible to maintain temporary patches in a safe condition for all types of travel until a permanent pavement repair has been made.” We agree with the commenters that suggested deleting the second sentence because (1) temporary patches would be replaced within five working days and (2) utilities are responsible to maintain temporary patches (see NEGA Comments at 2; MHA Comments at 9; MMA Comments at 16-17). Thus, the requirement for inspection of temporary patches would be unnecessary.

C. Other Issues

¹⁶ Since we deleted § 9.14, all succeeding sections will be renumbered accordingly.

1. Fees

Some commenters have requested that the Department address fees in its Standards (MHA Comments at 10). As noted, the SJC has ruled invalid those portions of an ordinance charging inspection and maintenance fees for street opening permits. Newton, 425 Mass. at 697, 699. However, the SJC noted that G.L. c. 164, § 70 requires a utility to procure a permit before excavating, and the court noted that a fee to reimburse a city for its costs in processing permit applications is valid. Id. at 699, 706. In addition, the SJC found that utilities have a duty to inspect excavation sites after a repair is made. Id. at 699-701. Municipalities, and not the Department, have authority to assess charges related to the costs of providing municipal services as long as those charges are consistent with state law as construed by the Court. See Art. 89, § 6 of the Amendments to the Massachusetts Constitution; G.L. c. 43B, § 13.

2. Accountability

The Department has reviewed the utility street restoration plans filed pursuant to its February 13, 1998 Notice of Compliance Review. We find that many plans lacked detailed information concerning internal written statements or policies designed to insure that managers and crews are aware of, and held accountable to, standards and procedures for street excavation and repair. Thus, the Department directs each utility company under its jurisdiction to file, within sixty days of this Order, adequate documentation ensuring that the utility has incorporated in its procedures the following: (1) a backfill/resurfacing training program for the company's street crew members and managers, including periodic refresher training; (2) a

schedule for periodic inspection by the company of past excavations over a one-or two-year frost cycle; (3) review of the work performed at each excavation site by crews and managers themselves (including a crew manager reporting and accountability provision for correction of failures to apply or to satisfy the Standards); and (4) a system for corrective action in the case of individual excavations and in order to identify and correct patterns of substandard performance, i.e. where managers or crews exhibit a continued uncorrected or systematic failure to comply with or meet the Standards.

3. Periodic Review of These Standards

MHA and MMA have suggested that there be a yearly process to (1) consider the effectiveness of the Standards; (2) review the information submitted pursuant to §§ 11.1 - 11.4 of the Standards; and (3) make recommendations to the DTE for any amendments to the Standards (MHA Comments at 9; Tr. at 40-41). We agree that a such review of the Standards is necessary and in the public interest. The appropriate interval for such review remains to be ascertained. We authorize the Director of the Gas Pipeline Engineering and Safety Division to establish a committee to meet and propose changes to the Standards, if necessary.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, it is

ORDERED: That the Standards To Be Employed by Public Utility Operators When Restoring any of the Streets, Lanes and Highways in Municipalities, attached hereto, be and hereby are adopted by the Commission, effective thirty (30) days from the date of this Order; and it is

FURTHER ORDERED: That not later than sixty (60) days after the effective date of these Standards, all utility companies under the jurisdiction of the Department of Telecommunications and Energy incorporate said Standards into their operating procedures, unless otherwise ordered by the Commission; and it is

FURTHER ORDERED: That all utility companies under the jurisdiction of the Department of Telecommunications and Energy make diligent efforts to inform municipalities of the Standards attached to this Order; and it is

FURTHER ORDERED: That all utility companies under the jurisdiction of the Department of Telecommunications and Energy follow all other directives in this Order.

By Order of the Department,

Janet Gail Besser, Chair

James Connelly, Commissioner

Paul B. Vasington, Commissioner

W. Robert Keating, Commissioner